LIBRARY
SUPREME COURT, U. S.

FILED
AUG 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-372

HERBERT HARVEY,

Petitioner,

—v.—

EMILE W. SAULNIER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND APPENDIX

HERBERT HARVEY, *pro se,*
Petitioner,
537 Stevens Road
Morrisville, Pa. 19067
(215) 295-1164

CONTENTS OF PETITION

	PAGE
Authorities Cited	ii
Petition	1
Opinions Below	2
Jurisdictional Statement	2
The Question Presented	3
Constitutional Provisions	3
Statement of the Case	4
Argument	7
Summary of Argument	12
Reasons for the Petition	12
Repudiation of Due Process	12
The Determined Court	15
Precedent	21
The Magna Carta	22
Summary of Petition	24
Reference Notes	25

Cases Cited

PAGE

Bioni v. Haselton, 134 A. 606 (Vermont Supreme 1926) 7

Canup v. Mississippi Valley Barge, 31 F R D 282 (Pa. W. Distr. 1962) 18

Consolidated Masonry v. Wagman, 383 F 2d 249 (Appeals 4 1967) 18

Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A 2d 201 (N.J. Supreme 1952) 7

Frahn v. Greyling, 195 So. 758 7

Grell v. Kelly, 134 N.J. Eq. 593, 36 A 2d 874 (Prerogative 1944) 20

Henschke v. Christian, 36 NW 2d 547 (Minnesota Supreme 1949) 11

Ledwith v. Storkan, 2 F R D 539 (Nebraska Distr. 1962) 18

Nelson v. Coleman, 41 F R D 7 (South Carolina Distr. 1966) 18

In Re Pfizer, 6 N.J. 233, 78 A 2d 80 (N.J. Supreme 1951) 9

Postal Telegraph Cable Co. v. City of Newport, Kentucky, 247 U.S. 464 (1918) 11

Pryor v. Western Paving Co., 184 P. 88 (Okla. Supreme 1919) 7

PAGE

Ralph Wolff & Sons v. New Zealand Ins. Co., 58 SW 2d 623 (Kentucky Appeals 1933) 11

Rogers v. Lyle, 372 P 2d 797 (New Mexico Supreme 1962) 18

Schwegman v. Neff, 29 NE 2d 985 (Indiana Supreme 1940) 11

Simmons v. Raudozzo, 25 NYS 2d 270 (Appellate 1941) 11

Universal Construction Co. v. Ft. Lauderdale, 68 So. 2d 366 (Florida Supreme 1953) 11

Watterson v. Tremaine, 24 NYS 2d 830 (N Y Supreme Court 1941) 11

Weaver v. No. Bergen Tp., 6 N.J. 475, 79 A 2d 286 (N.J. Supreme 1951) 9

Williams v. Board of Education, 124 N.J.L. 380, 12 A 2d 127 (N.J. Supreme 1940) 7

Williamson v. City of Clay Center, 237 F. 329 11

OTHER CITATIONS

Elliott on Appellate Procedure, 1892, Secs. 140, 144, 147 ..... 9, 17

N J S A 46:16-1.1* 19

* Abstracted where cited.

CONTENTS OF APPENDIX

PAGE

Hudson Trading Corporation vs. Saulnier Opinion (Supreme Court of New Jersey 1964) 1a

Bron vs. Harvey (the present case)

Complaint to Quiet Title 12a

Answer and Counterclaim 18a

Opinion Denying Summary Judgment 21a

Opinion 25a

Judgment (Court of Appeals) 30a

Denial of Rehearing (Court of Appeals) 32a

Chronology 33a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

HERBERT HARVEY,

Petitioner,

—v.—

EMILE W. SAULNIER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the affirmance without Opinion by United States Court of Appeals for the Third Circuit and the Final Judgment of United States District Court for the District of New Jersey in the matter of *Theodorus Bron, et al.* v. *Herbert Harvey, et al.*

Petitioner is Herbert Harvey appearing *pro se.* Respondents are Emile W. Saulnier and Jeanette G. Saulnier, his wife, Joseph Francis Moran and Eleanor Moran, his wife, Francis J. Straulina and Virginia D. Straulina, his wife. Respondents are plaintiffs in the said action. Petitioner is a defendant in the District Court and an appellant in the Court of Appeals.

Opinions Below

The Opinions in the District Court below are unreported and are appended. The Opinion cited therein, of the Supreme Court of New Jersey in the matter of *Bron* v. *Weintraub*, reported at 42 N.J. 87, 199 A 2d 625 is also appended. The affirmance of the District Court judgment by the Court of Appeals was without Opinion. Its affirmance is appended, as is its denial of a Motion for rehearing.

Jurisdictional Statement

Review is sought of the judgment of the United States Court of Appeals for the Third Circuit entered April 30, 1973 (Appendix, page 30a) affirming without opinion the judgment of the District Court in the matter of *Bron et al.* v. *Harvey et al.*, bearing docket number 72-1480 in the Circuit Court. Petition for rehearing was denied under date of May 31, 1973 (*ibid.*, page 32a).

In the absence of an opinion, the affirmance is in effect the judgment of the District Court which it affirms. The judgment in question was entered in District Court in the same matter, *Bron et al.* v. *Harvey et al.* under docket number 482-69 in that court. A stay was issued there on a Motion under Rule 52 (b).

Jurisdiction of this court is conferred in the opinion of petitioner by 28 U.S.C. §1254(1) providing that judgments of the United States Court of Appeals, as well as judgments of the United States District Courts, may be reviewed on certiorari. As to the District Court judgment

referred to, it may be embraced in this petition if the court determines the time for appeal of that judgment to have tolled while the matter was before the Court of Appeals.*

The jurisdiction of the District Court arose as set forth in this Petition, page 6.

The Question Presented

Where an individual, by judgment of a state court entered with no vestige of due process and so void, is purportedly divested of an estate in real property, and a federal court in a subsequent suit decrees the same divestment, without trial on the merits, solely on the basis of the state court proceeding, has due process of law been observed?

Constitutional Provisions

Amendment V No person shall be . . . deprived of life, liberty, or property, without due process of law.

Amendment XIV No state shall . . . deprive any person of life, liberty, or property, without due process of law.

Note—The actions of the federal courts below are considered by petitioner to come under Amendment V; but the state court action upon which they were based is also involved and comes under Amendment XIV. Since both may arise, both are cited.

---

* The distinction here made between a) reviewing the judgment of the Court of Appeals and b) reviewing the judgments of both courts below is purely formal, inasmuch as the judgments are in effect the same. Either way, the present petition applies.

Statement of the Case

In 1933 Harry Weintraub died seized of the lands of this proceeding.* In 1959 his heirs conveyed to Hudson Trading Corporation, a dealer in encumbered land titles. Petitioner was at the time secretary of Hudson Trading Corporation and the individual who negotiated the transfer of title.

It developed that part of the land was improved by three dwellings occupied by the respondents herein. They believed they owned them, having had them by deed from a speculative builder under GI financing. The error in title had been made by a title company employed, or at least paid, by the veterans, before they occupied the dwellings.

I wrote the occupants, mentioning the title situation and suggested they secure representation to settle the matter. They, however, went back to the title company for counsel. In the upshot, Hudson commenced an action for possession against the three veterans. They counterclaimed to quiet title. By that time I had resigned as an officer of Hudson. I was not a party to the proceeding nor to the counterclaim.

Hudson prevailed in the litigation—the court rendering judgment in its favor.** On appeal, the judgment was affirmed. On further appeal to the Supreme Court of New Jersey, the judgment was reversed in an Opinion holding Hudson to be a trustee *ex maleficio* for the occupants. The

---

* The lands of the fifth, seventh and eighth counts of the complaint, being portions of the lands now owned and occupied by respondents.

** And giving the occupants the option, which they did not exercise, of purchasing the properties from Hudson at the appraised value of the bare land.

facts upon which the trust was constructed were recited in the Opinion, but were not in the record before the court and had not been adjudicated in the proceeding. Pursuant to the reversal, the trial court entered an amended judgment divesting Hudson.*

In the meantime a $22,500. mortgage had been made to me by Hudson covering the lands of the action.** They also came under a blanket mortgage given to me by Hudson prior to the litigation, which covered all lands owned by it or to be acquired by it.† The amount of the blanket mortgage is $2,500. It provides that to the principal sum shall be added delinquent taxes paid by the mortgagor. Such delinquent taxes have been paid.

While I have not waived any portion of the demised interest, this petition concerns in the first instance the blanket mortgage.

---

* The action, *Hudson Trading Corp.* v. *Saulnier*, was consolidated in the state trial court with another action, *Bron* v. *Weintraub*, where the matter was heard on the issue of title (District Court, the Record, Exhibit DH-11, page 35a; item 7). In Supreme Court of New Jersey, on the other hand, the determination was made on an issue, there raised *de novo*, of constructive trust. In the matter of title, the cases were similar, title of all the properties having derived from Harry Weintraub. Respecting the constructive trust, the circumstances of the two cases were different. Among these differences, I note that in *Bron*, there had been pending at the time of transfer of title a foreclosure action on a tax lien. In *Saulnier* there was none. The pendency of the foreclosure was a leading factor in the construction of the trust. There were other substantial differences between the circumstances in *Bron* and the circumstances in *Saulnier*. Except that both titles originated in Harry Weintraub, the circumstances surrounding *Bron* were unique to that action. The petition here affects the lands of *Saulnier*.

** And assigned by me by mesne assignment to defendant Freda Solomon in 1966. The assignment to Freda Solomon was disallowed by the District Court.

† The chronology of these and certain other events affecting the properties appears in the Appendix, page 33a.

Although I had not been a party to the action, nor to the appeal, and though the Opinion of reversal made no reference to my interest, the amended final judgment which concluded the action named me as one of the persons who had thenceforth no interest in the property.

This was in 1964. In the succeeding years, various actions were brought in one court or another by others than myself* calling into question the trust *ex maleficio*. None of these attacks succeeded. Title of respondents was sustained under the trust holding.

The present action was instituted in 1969 in the New Jersey courts, and was removed on the motion of another defendant, under the jurisdiction conferred by 28 U.S.C. §1441 (a),** to the United States District Court for the District of New Jersey. It is the first action affecting the premises in question to which I was a party. Respondents here are among the plaintiffs. At the hearing plaintiffs introduced no evidence of wrongdoing. They stipulated to the title of my mortgagor, subject to the trust, and to the mortgage debt. They attacked my mortgages, based upon the trust *ex maleficio* imposed upon the mortgagor

---

* In addition, two proceedings were initiated by me and came to nothing. (1) As assignee of Hudson in the *Bron* action I applied for certiorari to the Supreme Court of the United States, on the ground that divestment of Hudson in that matter (also by trust *ex maleficio*) was based on facts which had never been tried in a court. (2) I applied to Superior Court of New Jersey to vacate the judgment in *Hudson Trading Corporation* v. *Saulnier* on the ground that it was entered against one not a party. The Supreme Court denied certiorari; Superior Court also declined to entertain my application, dismissing it instead ex parte without notice or hearing. Neither of these proceedings resulted in determining any issue.

** On a showing of diversity of citizenship and a cause exceeding $10,000.

by the New Jersey court. I counterclaimed for a holding that the state court judgment was void as against me.

The district court held that the trust reached back to destroy the mortgage made by the constructive trustee, Hudson Trading Corporation, and rejected my contention that the judgment imposing the trust was not binding on me as one not a party to the proceedings. Judgment issued in district court, accompanied by an Opinion, divesting me of my interest. The judgment was affirmed without Opinion by the Circuit Court of Appeals. This is a petition for review of the judgment and of its affirmance.

ARGUMENT

Due process of law, a broad concept, with many outlying fringes which the courts have diligently protected, has a certain indispensable core. The area of the present litigation is an individual's interest in real property. In that area, the elements without which due process in its bare rudiments does not exist are: a) an action to which the claimant is made a party;* b) service of process;** c) a judicial determination of the facts, in which the claimant may be heard.† Lacking one of these elements, a proceeding must be held deficient in due process. Lacking all three, there is no process of law at all.

---

* *Bioni* v. *Haselton*, 134 A. 606, 607 [1] (Vermont Supreme 1926); *Pryor* v. *Western Paving Co.*, 184 P. 88, 89 [1] (Okla. Supreme 1919).

** *Williams* v. *Board of Education*, 124 N.J.L. 380, 382 [2] (N. J. Supreme 1940); *Driscoll* v. *Burlington-Bristol Bridge Co.*, 8 N.J. 433, 493 (New Jersey Supreme 1952).

† *Frahn* v. *Greyling*, 195 So. 758, 761 [2]. The cases cited in the footnotes to this page furnish dicta.

In the present case, divestment of an estate in real property has taken place, absent all three of the elements in question.

My interest is that of mortgagee,[1] or as I prefer to formulate it here, a grantee with mortgage covenants.

The title of my grantor was upheld by a state court[2] and was stipulated in federal district court.[3] No evidence was introduced in district court to question the debt of the mortgages or to warrant an equitable determination against me.[4] In fact, no evidence was introduced in either state or federal court denigrating my interest.[5] After the mortgages were made, however, my grantor was divested of title, by a state court decree.[6] The divestment, though effective against my grantor, was not effective against me. I was not a party and I had not been served with process.[7]*

In the state court proceedings, the first mention of my interest was in the amended decree. That decree purported by its language to divest me of my interest.[8] Any one of the following conditions rendered it void as against me:

---

[1] Superscript numbers refer to Reference Notes beginning at page 25 of this Petition. Instruments there referred to in those Notes will be among those designated by petitioner as part of The Record for transmission to this Court.

* The District Court argued that the legal effect of divesting my grantor in the state court should be to divest me, since my title could rise no higher than his. (Appendix, page 24a.) This last is true; but I am not concluded by the determination against my grantor because I was not a party[8] to the proceeding.

Attention should be given to a remark in an interim Opinion of the district court judge, incorporated by referring in his final Opinion, to the effect that Harvey was not a party to the state court proceeding in the ordinary sense, but definitely was "in a real sense". (Appendix, page 23a.) No supportive facts are set out. This already foreshadows the issue. Divesting people who are not parties in the ordinary sense, that is, named in an action and served with process, but only in a "real" sense, to be defined at the pleasure of the judge, is a way of dispensing with due process.

a) I was not a party to the action;[10] b) there had been no appeal against me of the earlier decree in favor of my grantor;[11] c) the Opinion in the appeal had not mentioned my interest (Appendix, page 1a). Actually all three of the conditions obtained.

The divestment of my grantor was accomplished in the state court by constructing upon it a trust *ex maleficio* in favor of the defendants in the state court action (Appendix, page 11a). Three of the defendants there are the respondents to the present petition. The trust was established in the appeal reversing the earlier determination of the state court in favor of my grantor (*ibid.*). As already noted, I was not a party. Nor was I named as a party in the appeal.* The holding of trust *ex maleficio* was necessarily void as to me by virtue of my absence from all the proceedings.**

We have observed that in the state proceeding there was no determination, in either the trial court or the appeals court, of any fact bearing on the trust *ex maleficio*. The circumstances were these. The issue heard in the state trial court was of title only.[13] That issue was resolved, as

---

* One whose substantial interest is to be affected by an appeal is a necessary party to the appeal proceeding, whether or not he was a party to the original proceeding. Elliott on Appellate Procedure, 1892, secs. 140, 144.

** The rules of procedure in the state provide that a decree is not appealable after 45 days. Thereafter the interests vest which it determines. *In re Pfizer*, 6 N.J. 233, 239 [4], N. J. Supreme 1951; *Weaver* v. *No. Bergen Tp.*, 6 N.J. 475. Consequently, if I were held to be a party to the procedure in the state trial court, I would be of the prevailing party;[12] and failure to appeal it against me would render the judgment there entered (in 1962) *res judicata* in my favor. The contention of the district court (last footnote but one) that I was a party to the 1962 proceeding "in a real sense" would therefore be a bar to my divestment, rather than, as the district court argued, a ground for it.

noted, in favor of my grantor. The issue resolved by the state court on appeal was *de novo* of the trust *ex maleficio*. It was determined, against my grantor, on a set of operative facts not bearing on the question of title (Appendix, page 1a) and for which as a matter of fact no evidence was introduced in trial court.[14] These facts were never determined in that proceeding,* even as against those who were party to it, and certainly not as against me, who was not. The personal strictures (Appendix, page 4a) parenthetically indulged in, also without proofs, by the state court against me, being one not present in the proceeding, were little better than slanders, based on surmises. They, like the rest of the proceeding, cannot be conclusive on me.

In the state court action, then, judgment of divestment was entered against me in a proceeding in which I was not

---

* The operative facts which are found in the Opinion of the Supreme Court of New Jersey (Appendix, pages 1a and following) were that Hudson had read a published notice of constructive service addressed to Harry Weintraub and his heirs. "Our rules of court called for this public notice solely to reach the holders of existing interests, but Hudson read a communication intended for another and sought to turn that information to its own gain." (Appendix, page 6a.) This is the basis of the constructive trust as the Opinion makes clear in this language: "With respect to the factual pattern before us, no one disputes the right of the holders of existing interests to convey them to third persons if they wish. What is challenged is the legality of the intrusion into the scene by third persons . . ." And again, "We are dealing with tax titles. Contrary to early hostility to such titles, the policy today is to support them" (*ibid.*, page 5a). None of the facts here involved appears in the record before the court. The transcript of the trial court hearing in that matter is an exhibit in our record (Trial Exhibit DH-11). It fails to disclose any evidence that Hudson or its officers read the published notice or that there was any action pending at or about the time of Hudson's deeds affecting the lands of this petition; or that any tax title proceeding had been taken against them.

It cannot be assumed here that, had I been before the court in that matter, the alleged facts would have been allowed to go unchallenged.[15]

a party, was not served with process, in which no fact relevant to my interest was judicially determined, and indeed where my interest was not mentioned until in the amended final judgment. The proceeding, as far as affects me, lacked all the basic elements of due process.

In the federal court proceedings I met my burden of showing an interest in the land.[16] No evidence was presented in support of plaintiffs' contention that my interest be expunged.[17] There was no trial on the merits.[18] Merely the state court judgment which, of course, is *res judicata* against those who were party to it, was held conclusive also as against me. This question is well settled. A prior judgment is *res judicata* only as against persons who were party to the proceedings and their privies. It is not *res judicata* against one not a party.* *Postal Telegraph Cable Co.* v. *City of Newport, Kentucky,* 247 U.S. 464 (1918). For the dictum, reference is made to *Schwegman* v. *Neff,* 29 NE 2d 985, 986 [5] (Indiana Supreme 1940); *Watterson* v. *Tremaine,* 24 NYS 2d 830, 835 [6] (Supreme Court 1941); *Simmons* v. *Raudozzo,* 25 NYS 2d 270 (Appellate 1941); *Universal Construction Co.* v. *Ft. Lauderdale,* 68 So. 2d 366, 369 [4] (Fla. Supreme 1953); *Ralph Wolff & Sons* v. *New Zealand Ins. Co.,* 58 SW 2d 623, 624 [1] (Kentucky Appeals 1933). In *Williamson* v. *City of Clay Center,* 237 F. 329, 335 it was ruled that a mortgagee, not a party to an action which divested the mortgagor of rights, may

* The issue of privity does not arise. My claim as mortgagee arose when my mortgagor acquired title, which was a year prior to the commencement of the suit in which the title of the mortgagor was tried (the former date, as shown by the recordation of deeds, was in December 1959, the latter, in December 1960). "No one is privy to a judgment whose succession to rights of property affected thereby occurred prior to the commencement of the action in which the judgment was rendered." *Henschke* v. *Christian,* 36 N W 2d 547, 548, Minn. Supreme 1949, Syllabus by the Court.

again litigate the question resolved in the suit against his mortgagor. The state court judgment was not conclusive against me.

Summary of Argument

The district court in this matter did not try the issue between the parties on the merits. It relied exclusively upon a prior judgment in a state court proceeding. In the prior proceeding there was a total absence of due process as regards the judgment against me. In particular, it is not *res judicata* against me in the district court proceeding. The judgment of the district court is therefore a taking of property without due process of law. Our examination discloses a want of due process in the most elementary sense throughout the proceedings. This is the basis of the present petition for review of the District Court judgment and of its affirmance by the Court of Appeals.

REASONS FOR THE PETITION

The rules of your court covering applications for certiorari require me to offer reasons why this extraordinary remedy should be invoked.

Repudiation of Due Process

There are necessarily debatable fringes to a concept which spreads as wide as due process of law. But there is also a core which is axiomatic and beyond the scope of debate. The elements of the central core of due process are well known. In my argument, above, I have taken the liberty of describing them, as applies to the specific area of real property interest which concerns us here. I do not believe there is any ambiguity about what comprises due process in that area, and I believe I have shown that its

fundamental elements are absent in the proceedings below in this matter—absent not merely in one particular, but in all particulars. I cannot cite a case, because I know of no published cases in which so completely is due process of law absent. What federal judge has before published an opinion in which real property was divested with neither proof nor allegation before the court of any fact in support of the divestment, merely on the basis of a state decree which was itself entered wholly without process of law?

To review briefly, respondents, as plaintiffs in the district court, mindful, I suppose, that the decree in the state court was a nullity as to my interest, applied in the district court for a decree quieting their title and holding me to have no interest. I answered, asserting an interest and counterclaiming for a decree of the district court that the state court judgment was void as to my interest.

Respondents introduced no evidence in district court in support of their plea. They rested on the void judgment.

In that posture, the district court entered its judgment divesting me. It gave an Opinion citing the state judgment. It offered no other reason for divesting me. The district court judgment was affirmed, without Opinion, by the Circuit Court of Appeals.

This comprises a taking of property without due process. It is, indeed, without all semblance of it and presents a serious problem in jurisprudence.

The mischief, I will argue, does not lie in the decree of the state court, however improvident the entry of it may be and manifestly is. That decree, in a matter where I was not before the court, involved implicitly a divestment of real property without due process of law. But in the federal district court, I was a party. In the dispute, it was

my day in court. It was my only day in court. The judgment in that court is explicitly a determination that one may be divested in a state court without due process. Its judgment becomes an affirmative assertion by a federal court that due process of law is unnecessary to divest. It rests there.

It may be noted that I did not come into federal court against respondents. They came into court demanding divestment of my mortgages on the sole ground of a state court judgment which lacked all semblance of due process. This is the posture in which the district court judgment issued.

A holding that a federal court will divest without due process, and its affirmance, without opinion, by the Court of Appeals, is what I submit to your court as warranting review. It is a question of broad public import. There is not a property owner within the reach of federal jurisdiction whose interests are not affected.

To be sure, this decision affects the interest of only one property owner, myself. It may be said, there must have been a reason. Perhaps the court felt that I was a scoundrel. However, no allegation and no proof was presented to the court to the effect that I am or was a scoundrel. If that was the court's reason, it was mere whimsy. This is sharply distinct from due process. Even scoundrels, it may be noted, must have due process if due process is to exist at all.

Or perhaps there were other reasons. Whatever the motive which impelled the instant decision, it threatens due process of law throughout the jurisdiction, and is a proper subject for review in this court.

The Determined Court

The approach of the trial court to this litigation is illuminated by examining certain details.

i) In the Opinion of the trial court (Conclusion of Law) we find (Appendix, page 28a):

> **2. In accordance with the Amended Final Judgment of the Superior Court in Bron v. Weintraub, I find that Harvey was a party to the New Jersey litigation . . .**

This is of course a solecism. One becomes a party to litigation by being mentioned, not in the final judgment, but in the complaint.

ii) In the same Opinion, under findings of fact (Appendix, page 27a) we read that the Opinion of the New Jersey Supreme Court fixed the effective time of the trust it imposed on Hudson as running:

> **4. . . . from the date of the purchase of [Hudson's] deeds back in 1959.**

Reference to the Opinion in question (Appendix, page 11a) does not support the finding.

And again (Appendix, page 28a):

> **7. On September 10, 1966 Harvey filed a suit in New Jersey Superior Court against three of the present plaintiffs for vacation of the Amended Final Judgment as to their properties. On September 16, 1966 the suit was dismissed.**

The court might appropriately have added that the dismissal was *ex parte* and without notice to Harvey.[10] The

suit was dismissed at the request of counsel for my adversaries (present counsel), without notice to me either before or after.[20] The language of the Opinion might leave the impression that my application to the state court had been considered and denied. That was not the case. The application was not entertained and no adjudication was made.

iii) The Opinion (Appendix, page 26a) refers back for some of its facts to a previous Opinion of the same Court (*ibid.*, page 21a). Among them we find (*ibid.*, pages 23a, 24a):

> Harvey's part in this "heir-hunting" masquerade was duly criticized by the [New Jersey Supreme] Court . . . Harvey surely does not attempt to cloak himself in the robes of an innocent and detached third party. If he is making this claim he should be thoroughly chilled, having been stripped of these garments back in 1964 by Chief Justice Weintraub's precedent-setting opinion.

There was nothing before the (district) court at the time this was written to justify such language.* The observation is made apropos of the circumstance that I knew of

---

* A single passage appears in the *Bron* (state court) opinion regarding Harvey. The language is derogatory (Appendix, page 4a). In reading it, one may bear in mind that Harvey was not before that court at the time. Specifically the reference is to a letter written by him. The interpretation placed on the letter is, as noted in the text *supra*, somewhat subjective and quite hostile. The court goes on to observe that it is not in possession of all the correspondence and that the letter is not a factor in its determination (*ibid.*, page 4a). The letter in question does not refer to the properties involved in this petition, but to other properties.[21]

In evaluating the (district) court's remarks cited in the text, it should be observed that the Opinion from which they are quoted was filed prior to the taking of testimony in that court.[22]

the state court litigation. I did know of it. I also knew that I was not a party to it; that I was not present in the proceedings before the Chief Justice on appeal; and that the Opinion there made no mention of nor determination of my interest.* The employment by the District Court in its Opinion of animadversions in place of facts is perhaps not untypical of the proceedings in that court.

iv) Upon the filing of the complaint below, I counterclaimed for relief—vacation of the state court judgment as to me as affecting three of the ten causes of action in the complaint. Appendix, page 20a. Meritorious grounds were set forth for this relief.

The time allowed by the rules of practice for plaintiffs to answer the counterclaim expired. Six months elapsed after that, and default judgment issued against plaintiffs for the relief prayed for in my counterclaim.

Shortly after that, plaintiffs moved to vacate the default judgment, on the score of inadvertence,[23] no excuse for inadvertence being offered.** On the return date of their own motion to vacate, plaintiffs did not appear.

---

* The manner in which the issue was reached in the (state) litigation may be recounted. In the state trial court the issue was of title. On this issue, my grantor prevailed. Present respondents appealed. I could not have joined in that appeal, had I been a party, because a successful party cannot appeal a judgment. Elliott on Appellate Procedure 1892 Sec. 147. On the appeal, to which I was not made party, the issue was raised for the first time of trust *ex maleficio;* and it was on this issue and in the appeal that respondents prevailed. If respondents then were or now are to challenge my mortgage by that proceeding I was a necessary party, particularly to the appeal (*ibid.*, secs. 140, 144), and it was respondents' omission to name me that was specifically responsible, under the circumstances in which the issue was raised, for my failure to confront them in the state court.

** Plaintiffs' whole contention was "Inadvertently no answer was filed." [24]

Later, however, plaintiffs renewed their motion and the court vacated the default judgment against them.[25]

In so doing, the court exceeded its powers. The cases hold that a default judgment may be vacated, but not in the sole discretion of the trial court. There must be lawful grounds. *Ledwith* v. *Storkan,* 2 F R D 539, 541 [1] (Nebraska District 1962), *Consolidated Masonry & Fireproofing, Inc.* v. *Wagman,* 383 F 2d 249, 251 [4] (Fourth Circuit 1967), *Canup* v. *Mississippi Valley Barge,* 31 F R D 282 (Penn. W. District 1962), *Nelson* v. *Coleman,* 41 F R D 7, 10 [6] (South Car. District 1966).* In *Ledwith* we read:

> But the admonition towards indulgence in the exercise of an allowable discretion must not betray the court into a meddling manifestation of assumed discretion in circumstances which, under the rules, do not bring discretion into operation. Much less should it be resorted to in support of an indefensibly sympathetic appraisal of an attempted showing of "inadvertence or excusable neglect". If the showing be inadequate fairly to establish such "inadvertence† or excusable neglect", the simple, even if sometimes unpleasant, duty of the court is to find accordingly and deny the relief sought.

The vacation of the default judgment, which was beyond the powers of the court, may well be described as a favor granted to the defaulting parties by the judge.

v) As an incident of the relief granted to respondents the judgment below directs the County Clerk to strike my mortgages from the record.[26]

---

* On plaintiffs' failure to appear at hearing on their default, see *Rogers* v. *Lyle,* 372 P 2d 797, 800 [10] (New Mexico Supreme 1962).

† As qualified by the court. (Note by petitioner.)

To be sure, the judgment holds the mortgages to be not a lien against the properties of the suit. But the first mortgage by its terms[27] covers other properties, not involved in the suit. On what ground does the court divest me of these other properties? other than because it doesn't like me.

New Jersey law (N J S A 46:16-1.1)* permits recordation with the County Clerk of a federal court judgment affecting real property, and provides that such recordation is notice to all persons of the terms of the judgment and of the existence of the proceeding out of which it arose. Recordation of the judgment would therefore effect the complete remedy required by respondents. There was neither need nor authority for the court to cancel the mortgage of record. The cancellation is a taking of property, and as affecting the lands which are not embraced in the suit, it is a taking without process of law. It suggests an indifference to due process.

vi) Numerous minor statements of fact in the Opinion are also unsupported by evidence: e.g. (Appendix, pages 21a and following) that I am the assignee of Hudson; that an attempt was being made by the Township to perfect title to the lands in question by tax proceedings; that plaintiffs built homes; the reference to misleading negotiations; that I have acquired the interest of other defendants in the litigation; that I base my claim to the properties in question on the circumstance that they were omitted from the tax foreclosure action; that the state court had held Hud-

* Certified copies of . . . final judgments of courts of record of this State and of the United States . . . relating to or in any way affecting title to real estate may be recorded as deeds of conveyance in the office of the county recording officer . . . which when recorded shall from that time be notice to all subsequent judgment creditors, purchasers and mortgagees of the existence and contents thereof.

son to have acted in violation of the legal rights of the owners; that the judgment against me in the state court was entered "in accordance with the directions of the New Jersey Supreme Court"; that I assumed control of the litigation there. These various statements contribute their coloration to the picture painted by the court and are presumably intended to add equitable support to the conclusion that I should be divested of my interest. But in the absence of evidence they fail of such support. *Grell* v. *Kelly*, 134 N J Equity 593, 601 (Prerogative Court, 1944).

vii) The basic premise of the district court is as follows. The lands in question were owned by the heirs of Weintraub, but were occupied, without knowledge of that, by persons who had no title. Years later, the occupants suddenly became the owners solely by virtue of the fact and, the timing being essential, at the instant when the Weintraub heirs conveyed the property to Hudson Trading Corporation. In the absence of all prior dealings between the occupants and Hudson, this construction is fanciful. In the essential matter of timing, it does not conform very well (page 15 *supra*) with the earlier Opinion, in another court, on which it purports to be based. It is not, however, upon the unconvincing nature of the district court's premise that my argument is based. I am arguing rather a want of due process in relying on the earlier decision, in a matter where I was not before the court, as determinative against me here. The fragility of the logic of the district court in doing so seems, however, corroborative of its willingness to divest me without benefit of due process.

This section has been an examination into the details of the district court's decision. It discloses that the decision abandoned due process. The court, to be sure, does not

announce that to be its method. There are verbalisms and even some outright misstatements by way of doing obeisance to form. But the form, as our examination shows, lacks substance. In substance the decision says that due process is not necessary to divest.

Precedent

The case is without precedent. No decisions quite like it have been found. It is a case where a federal court brings in a judgment destroying a vested property right with no evidence before it which would warrant either a legal or equitable divestiture.

There was, to be sure, a void state court judgment. It is not unprecedented that a dubious judgment of a state court has been upheld by a federal court. But there had to be circumstances warranting it, and some proof of the circumstances. In this matter, the absence of proof in the federal court is matched only by the absence of proof in the state court. In both courts, trial of the facts is absent. The decision in the federal jurisdiction is a product of judicial caprice.

In this respect the case is one of novel imprint. Its value as precedent may be considered. The decision states that a mortgagee may be wiped out by a (state) proceeding to which the mortgagee is not a party, so long as the mortgagor is. If this proposition is vindicated the multi-billion dollar market for mortgages in the United States cannot fail to be impaired. A recorded mortgage will fail on a subsequent determination adverse to the mortgagor alone. It may be said in contravention that the circumstances of this case are special. True; but the circumstances of every case after differ from other cases. And when a new principle of law is established, even restricted to certain circumstances,

other cases arise in which litigants seek to widen the application.

What, generally speaking, the present decision states is that a grantee may be divested of real property, merely by implication in an action against his grantor which does not challenge the title of the grantee nor make him a party to the action. Whatever the circumstances of the transaction—and we have no evidence in the record as to what the circumstances were or were not, so that the determination, so this precedent tells us, is a matter of taste on the part of the trial judge—we are dealing here with a procedure which fractures the confines of due process. The opening in the wall, let us say, is narrow. It embraces only this case. But once the wall is breached for the single chariot, other vehicles will pass through. The breach will be widened to accommodate the traffic; and ultimately the mischief will cost dear.

A slow gestation of bad law is the foreseeable outcome. In the end the Supreme Court will be presented with it. This petition suggests it be dealt with now by choosing the present ill-conceived decision for review.

"To no man will We deny . . ."

Our government is of three mutually independent branches. In various areas one or another of these branches may be found sovereign. In the area we are discussing, real property of individuals, the courts are sovereign. No doubt it is conceivable that the executive might call out the militia to controvert a court order with respect to real property. The executive has been known to do something of the sort in other areas of law. But to my knowledge, no judgment of a court with respect to real property has been voided by an

executive in any federal jurisdiction in this century. The courts are sovereign there.

Prior to the Magna Carta, seven hundred years ago, the law was the caprice of the sovereign. Both the property and the necks of the subject were at the sovereign's discretion. His whim was their fate. It was the Magna Carta which gave courts the responsibility of replacing the whim of the sovereign with due process of law.

The decision for which review is here sought returns to the earlier condition. The proceeding in the federal district court, as we have seen, repudiates due process of law in the most fundamental sense. One will scarcely take seriously the court's stated position that one person is divested by a proceeding brought against others. The determination is essentially the whim of the judge, acting as sovereign. We are back to the century before the Magna Carta, where the sovereign supersedes both law and equity, and where due process of law was not required.

To be sure, this case affects only property. It does not jeopardize anyone's life or liberty. I feel sure that, if life or liberty were forfeit without due process, this court would intervene. It is proverbial that it will not intervene in matters arising in state courts affecting title to real property. In that area of law, judges, whether state or federal, need not limit themselves by due process precisely because they know that no higher court will review.

I have been assured by competent legal practitioners that it is so; that because the Supreme Court will not intervene in the given area, state courts can do what they please with the real property of individuals, and in so doing may slander as required. In the present matter the credo has

been embraced by a federal court. It is no longer in the realm of gossip. Affirmed, it has become a retrogressive element in the law of the land. It should not be allowed to stand.

Summary of Petition

In substance the question here presented is, where an individual by the decree of a federal court is divested of an estate in real property without a trial on the merits and solely on the basis of a void prior judgment of a state court, has due process of law been observed? It is argued here that such a decree, upheld, repudiates due process outright and turns over all real property in the United States for disposition to the unrestricted discretion of the state and federal judiciary.

The limitation on judicial power is review. Review is here requested.

HERBERT HARVEY,
pro se.

REFERENCE NOTES

1 Trial Exhibit DH-1. Transcript, pages 13, 16ff.

2 Trial Exhibit DH-11, page 83a (and see cover).

3 Transcript, page 17; Appendix, page 33a.

4 Transcript, *passim*.

5 *Ibid.*; Trial Exhibit DH-11, pages 47a and following.

6 Trial Exhibit P-2, last 3 counts.

7 Trial Exhibit DH-11, page 21a; Transcript, page 38.

8 Note 7.

9 Trial Exhibit P-2.

10 Note 7.

11 Trial Exhibit DH-11, page 87a.

12 Note 2.

13 Exhibit DH-11, page 35a, item 7.

14 Exhibit DH-11, pages 47a-71a. No record was kept in the upper court.

15 See, e.g., The Record, U.S.D.C. N.J. "Harvey Affidavit 1" at present bearing instrument number 23 in that court, paragraphs 39 and 41 in the document therein referred to, shown in the docket of the U.S. Court of Appeals for the Third Circuit as filed there April 30, 1973.

16 Transcript, pages 17ff.

17 Transcript, *passim*.

18 *Ibid.*

19 Transcript, pages 48 and 60; see documents of Note 15, reference par. 48.

20 *Ibid.*

21 As appears from a collation of the letter in question (Trial Exhibit DH-11, p. 64a), its date (Appendix, page 3a), the deed there referred to (Trial Exhibit DH-3) and the amended final judgment of the state court (Trial Exhibit P-2).

22 The Opinion was filed Feb. 16, 1971 (The Record, docket entry 2-17-71); testimony was heard June 1, 1972 (Transcript).

23 The Record, U.S.D.C. N.J., paper at present bearing instrument number 24, Affidavit, paragraph 2.

24 *Ibid.*

25 The Record, U.S.D.C. N.J. Docket entry for Dec. 20, 1969.

26 The Record, U.S.D.C. N.J. Final Judgment—paper at present bearing instrument number 48 last paragraph.

27 Trial Exhibit DH-1.

Instruments above cited will be designated by petitioner to the appropriate clerks to be certified as portions of the record.